87-1698

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

*

SHEREEN RAMONA ZIPFEL, *et al.*,
Petitioners,

versus

CROWLEY MARITIME CORPORATION, *et al.*,
Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Benton Musslewhite
Attorney for Petitioners
609 Fannin, Suite 517
Houston, Texas 77002
Attorney in Charge

John O'Quinn
3200 Texas Commerce Tower
Houston, Texas 77002

Lyle C. Cavin, Jr.
122 World Trade Center
San Francisco, Cal. 94111

Attorneys for Petitioners

QUESTIONS PRESENTED

1. When the federal district court is going, in any event, to adjudicate *all* issues with respect to the case of at least one plaintiff injured or killed in a mass accident, is it an abuse of discretion for that court to dismiss on grounds of forum non conveniens the cases of the other plaintiffs arising out of the same accident?

2. Whether in this case - in view of the fact that the parties and witnesses were spread throughout many countries; a substantial number of the witnesses and documents were located in the United States; and the plaintiffs had stipulated that: they would bring all plaintiffs not then living in the U.S. to the U.S. for depositions, would permit the plaintiffs to be examined in the U.S. by doctors of defendants' choice, would use only American experts who would be easily

available in the U.S. for depositions and would pay the cost of transportation and expenses for defendants' counsel to go to any foreign country to take the depositions of the relevant witnesses not located in the U.S. - it was an abuse of discretion to dismiss the foreign seamen's cases on ground of forum non conveniens?

3. Whether - if the district court was correct in holding that the Jones Act and American maritime law did not apply - the federal district court should have then applied the forum non conveniens law of the state forum rather than apply federal forum non conveniens law?

4. Whether the terms and provisions of the Shipowner's Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693 ("SLSIS Treaty"), particularly Sec. 11 thereof (mandating that all members of the crew of a vessel be treated

equally "regardless of nationality, race or domicile"), require the owners of American vessels to make available the same benefits, including Jones Act (46 U.S.C. 688) benefits, to the foreign members of the crew under the same circumstances they would be available to the American members of the crew?

5. Aside from the SLSIS Treaty, whether the initial district judge in this case[1] was correct (and the succeeding district judge and the Court of Appeals wrong in refusing to do so) in taking the global view of this accident and - since the Jones Act applied to the rights of the American seamen who were injured or killed in said accident - thus applying the Jones Act to *all* the seamen involved in the same accident?

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1. Judge Aguilar was the presiding judge from the date suit was filed until January of 1985. Judge Schwarzer then took over the case in January of 1985 and handled it to final judgment.

6. Whether - when the contract between an owner and time-charterer of a vessel provides that all disputes arising out of the use of such vessel are to be decided in accordance with American law and the seamen on such vessel are the third-party beneficiaries of such choice-of-law provision - such seamen should have their rights decided pursuant to such choice-of-law provision in case of injury or death arising out of their service to the vessel?

7. Whether - when seamen are injured or killed on land while on their way to their vessel - the court should modify the usual maritime choice-of-law criteria with an overgloss of state, non-maritime choice-of-law considerations?

8. Whether the "rig cases" doctrine, adopted by the Ninth Circuit in ***Phillips v. Amoco Trinidad Oil Co.***, 632 F.2d 82 (9 Cir.1980), cert den. 451 U.S. 920 (1981),

which places greater weight in a maritime choice-of-law determination upon the nationality of the seamen, place of accident and place of the seaman's contract - conflicts with the decisions of this Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), which place controlling weight upon the nationality of the shipowner, the flag of the vessel and the base of operations of the shipowner, and therefore should be disapproved by this Court?

9. Whether the district court, in a Jones Act choice-of-law determination, should defer the ultimate decision to the trial on the merits where a jury has been requested and there exists disputed fact issues as to certain elements of the criteria relevant to such determination?

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs:

Shereen Ramona Zipfel, Individually and as Administratrix of Ian Charles Zipfel, deceased; Ten Fong Craig, Individualy and as Administratrix of the Estate of William Henry Craig, deceased; Chan Luck Chee; Vyner Gerard Albuquerque; and Patrick Paul Grunke.

Defendants:

Crowley Maritime Corporation; Brinkerhoff Maritime Drilling Corporation; Brinkerhoff Maritime Drilling Corporation, S.A.; Brinkerhoff Maritime Driling Corporation PTE, Ltd; Conoco, Inc.; Halliburton Company; Atlantic Richfield Company; Arco Oil & Gas Corp.; McClelland Engineers, Inc.; and Oceaneering International, Inc.

TABLE OF CONTENTS

Table of Authorities

Statutes:

Other Authorities:

NO.

*

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*

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Petitioners Shereen Ramona Zipfel, Patrick Grunke, Vyner Albuquerque and Chan Luk Chee respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 24, 1987.

OPINIONS BELOW

The original opinion of the Court of Appeals is reported at 820 F.2d 1438. On November 24, 1987, the Ninth Circuit filed its amended opinion. This amended opinion is "For Publication" but has not yet been published. It is contained in the appendix to the Crowley Petition for Certiorari at A-1. The opinion of the district court is reported at 615 F.Supp. 1021 and is contained in the appendix of the Crowley Petition at A-32.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1987. A timely petiton for rehearing and rehearing *en banc* was denied on November 24, 1987, at which time the Court of Appeals filed its amended opinion. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS RELEVANT TO THIS PETITION

This petition involves the Jones Act, 46

U.S.C. 688, and the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693 ("SLSIS Treaty") and less directly Rules 12(b) and 56 of the F.R.C.P. The relevant portions of the Jones Act and the SLSIS Treaty are set out in Appendix I.

STATEMENT OF THE CASE

The Petitioners are four foreign seamen (or their survivors) of diverse nations,[1A] who are now the residual plantiffs of suits originally brought by ten highly skilled seamen (or their survivors) who were killed or injured when the DC-3 aircraft on which they were being transported, as part of a journey from

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1A. Ian Zipfel, British, was killed in the crash; Patrick Grunke, Australian, was severely injured in the crash; Vyner Alburquerque, Singaporean, was severely injured in the crash; and Chan Luk Chee, Singaporean, was severely injured in the crash. Most of the facts stated in our "Statement of the Case" are those found by the two district judges who considered the case, Judge Aguilar and Judge Schwarzer. Some of these facts were referred to by the Court of Appeals. See Judge Aguilar's three opinions, Plaintiffs' Appendices A, B and E to this Petition; Judge Schwarzer's opinion, Appendix A-35 to A-37 of Crowley's Petition (No. 87-1122); and

Singapore to the vessel on which they served, crashed on approach to Pekanbaru, Indonesia. None of the original plaintiffs were from Indonesia, the place of the crash. Four were American, two were from Singapore, one was Canadian, one was British, one was Australian and one was from New Zealand. All were employed by American corporations or subsidaries of American corporations, were treated as expatriates by their employers and it was understood that they could be required to serve upon any vessel, in any sea at the discretion of their employers.

The vessel to which they were traveling

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statement of facts by the Court of Appeals, A-8 to A-11 of Crowley's Petition. We are referring to the appendices to this petition as "plaintiffs appendix" and to the appendix to the Crowley Maritime (Brinkerhoff) petition, No. 87-1122 on the docket of this Court, as the "Crowley appendix". We have been given permission by Crowley's counsel to refer in this petition to the appendices in the Crowley petition. The abbreviation "E.R.", used throughout the petition, refers to the Excerpts of the Record on file in the Court of Appeals.

was the Brinkerhoff I, a drilling vessel which was then drilling for oil in the Malacca Straits off Indonesia. It had been built in the United States, thence had sailed (with the assistance of a towing vessel) across the Pacific, and thence had operated in the South China Sea, the Java Sea, had sailed into Singapore harbor and, finally, was operating in the Malacca Straits.

The Brinkerhoff I flew the American flag and its home port, selected by its owner, was San Francisco, California. It was owned and operated by Brinkerhoff Maritine Drilling Corporation ("BMDC"), an American Corporation with its home office and corporate base of operations in San Francisco.[2]

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2. The Brinkerhoff I was regularly inspected and regulated by the U.S. Coast Guard; routinely inspected by the American Bureau of Shipping, an American classification society; and drilling operations had to comply with the standards set by the Association of Drilling Contractors ("IADC") and the American Petroleum Institute ("API"), both American entities. See the deposition of BMDC officer Leon Moore, pp. 85-95, 104, 105, 116, 117.

The Brinkerhoff I was, at the time of the accident in question, being operated pursuant to a contract between BMDC and Atlantic Richfield Indonesia Inc. ("ARII"), an American Corporation with its home office and corporate base of operations in Los Angeles, California. That contract required BMDC to provide "commercial airline (transportation) from outside Indonesia to area of operations," see Schedule D., p.3 of App. B of plaintiffs Appendix, and to provide "transportation equipment" for personnel serving on the Brinkerhoff I.[3] Most important, the contract contained a choice-of-law clause which provided that all disputes arising out of the use of the Brinkerhoff I would be decided pursuant the law of the "State of California-U.S.A." The contract manifests an intention that the members of the crew, though not nominal parties to

3. BMDC fulfilled its contractual obligations to provide such transportation to the "area of operations" through a contract made by Hudbay Oil Malacca Straits Ltd., an assignee of some of ARII's rights in the Malacca Straits area, with the company operating the DC-3 which crashed.

the contract, would be third-party beneficiaries of the choice-of-law clause.[4] Moreover, other contracts related to the operation of the Brinkerhoff I also required adjudication of all disputes under American law.[5] Indeed, although the district court found that the base of operations of the Brinkerhoff I at the time of the accident was Singapore, its use and operation was first, last and always an American enterprise controlled -

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4. The terms of the contract - the indemnity provisions; the provisions requiring insurance coverage for injuries to, or the death of, the members of the crew; and other provisions - demonstrate that the parties to the contract, BMD and ARII, contemplated that the operation and use of the Brinkerhoff I might result in injury or death to the members of the crew and that they or their survivors might seek to assert, as third-party beneficiaries of the choice-of-law clause in the contract, their rights under American law. App. G, plaintiffs appendix.

5. These include one of the few "third-party contracts" which were made available to Plaintiffs and that is the contract between Halliburton and ARII Tab 13 E, Supp. Excerpts of Record on file in the Court of Appeals, and the Agreement among the parties who owned the lease on which Brinkerhoff I was drilling. Tab 13-F, Supp. E.R.

as a result of the free, voluntary choice of the relevant parties - by American law.

The place of the accident was fortuitous because the DC-3 was in the process of transporting the plaintiffs and decedents across land in Singapore, across international waters and across land in Indonesia, when the crash occurred while the plane was on approach to the airport at Pekanbaru. The defendants asserted, in their moving papers in the district court, that the crash occurred, at least in substantial part, because of pilot negligence, and relied upon the report of investigation of the accident issued by the Indonesian Government. Since the plaintiffs also relied upon this report there appears to be no dispute about the negligence of the pilot being a major cause of the accident. Five of the eleven original plaintiffs or decedents were directly employed by BMDC and though the other six plaintiffs or decedants were nominally employed by other American

corporations or their subsidaries, there was at least a fact question as to whether those six were the *de facto* maritime employees of BMDC, the owner and operator of the Brinkerhoff I.[6]

Moreover, a Jones Act employer has the non-delegable duty to provide safe transportation to and from the vessel and is liable for the negligence of those entities providing such transportation, even though they may be independent contractors.[7] This becomes important when

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6. As stated in *Baker v. Raymond Int'l, Inc.*, 656 F.2d 175 (5 Cir. 1981): "In complex industrial arrangements...the attributes of employment may not all incur in the vessel owner. In the usual case involving injury to a seaman, either the principal contractor or the shipowner is more affluent and accessible than a subcontractor; and a worker normally employed by a subcontractor seeks to establish an employment relationship with a better target. *Spinks v Chevron Oil*, 507 F2d 216, 226 (5 Cir.1975). If that target company has, in fact, assumed significant attributes of an employer, it will not be permitted to shed the employer's costume when the worker is injured."656 F.2d at 177.

7. Such non-delegability, or imputation of negligence from an independent contractor to a railroad (FELA) and/or Jones Act employer, is well recognized in American law. *Sinkler v. Missouri P. Ry. Co.*, 356

it is recognized that the imposicion of the non-delegability rule may be the only way that the plaintiffs can establish liability against the American defendants and such defendants failed to show in the district court that such rule would be available in the courts of Singapore or Indonesia.

In addition, the defendants failed to demonstrate in the district court that the discovery procedures of Singapore or Indonesia would make it possible for the plaintiffs, from a practical standpoint to really have any remedy in those courts.[7A]

U.S. 326; *Rogers v. Missouri P. Ry. Co.*, 252 U.S. 500; *Hopkins v. Texaco*, 383 U.S. 262; *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5 Cir. 1977).

7A. Defendants did not show that Pat Grunke, for example, could produce the testimony of his Australian treating doctors in Singapore or Indonesia through depositions or interrogatories (Grunke not having the exhorbitant funds it would take to fly his treating doctors to Singapore or Indonesia) or for any of the plaintiffs to obtain, by deposition or interrogatories, the testimony of the air controllers in Indonesia if the trial were held in Singapore or for any of the plaintiffs to obtain by discovery the testimony of the BMDC or ARII employees no longer under their control and who do not live in Singapore or Indonesia.

In addition, there was a direct difference of opinion between the plaintiffs and defendants' experts as to whether the statute of limitations defense is waivable in either Singapore or Indonesia.[8]

The defendants also did not, in the district court, specifically identify the witnesses they would call at a trial on the merits, their present location and the general substance of their testimony. Thus, it was impossible for the district court to "balance the convenience of the parties."[8A]

In addition to the fact that supervisory and executive personnel with

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8. See *In re Aircrash Bombay, India*, 531 F.Supp. 1175 (W.D.Wash. 1982). The plaintiffs established that the courts of Singapore and Indonesia hold that any causes of action arising out of an aircrash are "extinguished" two years after the accident.

8A. The district court alluded to the number of depositions scheduled by plaintiffs overseas; but most of those were scheduled at the suggestion of defendants' counsel to assist defendants in settlement evaluations. See affidavit attached to Pltfs. Response to Deft's mot. for Protection, TAB 45, E.R.

relevant knowledge (re: safety policies and other matters pertaining to the operation of the Brinkerhoff I) were located in San Francisco and the U.S., the plaintiffs stipulated that: (i) they would present all plaintiffs in San Francisco for depositions there; (ii) they would consent to have the plaintiffs examined in San Francisco by doctors of defendants' choice; (iii) they would use only American experts, including air crash reconstruction experts, economists, medical doctors and psychiatrists; (iv) they would stipulate to the admissibility of the report of investigation of the aircrash made by the Government of Indonesia; and (v) they would pay the expenses of counsel for defendants to travel to any foreign nation to take the depositions of all relevant witnesses located there.

The accident in question occurred on April 2, 1981 and suits were filed in early 1982. Soon after suits were filed,

defendants filed motions for summary judgment on the ground that the Jones Act did not apply and that, therefore, the district court did not have subject matter jurisdiction; they also asked the court to dismiss the cases on ground of forum non conveniens. After several depositions were taken, a large number of documents produced, and extensive briefing and argument, the Judge presiding at that time, Robert P. Aguilar, on October 11, 1983 entered an Order holding that the Jones Act applied to *all* of the actions arising out of the aircrash in question and denying the forum non coneveniens motion. See App. A, pltfs app. The defendants filed a motion for reconsideration or, in the alternative, for certification for interlocutory appeal, and, on January 16, 1984, Judge Aguilar denied the motions for reconsideration but did certify the case for interlocutory

appeal.[9]

The Court of Appeals twice denied the request for interlocutory appeal, App. C and D, pltfs app.; Judge Aguilar entered another order;[10] and the Court of Appeals, for a third and last time, once again denied the interlocutory appeal. In the meantime, the fickle hand of fate dealt the plaintiffs a harsh blow. After the case had been pending for over three years; the plaintiffs had won the choice-of-law/forum-non-conveniens contest before the district court not just once but on two subsequent rehearings; the plaintiffs had successfully opposed inter-

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9. See App. E, pltfs app. The question certified was: "What law, United States law (e.g. Jones Act) or Foreign law, applies to this matter?"

10. In his third Order on the subject, Judge Aguilar found that the law of the flag was American; the "overall base of operations of the corporate shipowner defendant ... was in San Francisco, California"; the base of operations of the vessel was either Singapore or Indonesia; and that three of the ten remaining seamen Plaintiffs (or their decedents) were American and seven were of "a variety of countries", not including Indonesia.

locutory appeal in the Ninth Circuit on not just one, but three, occasions; and depositions upon the merits were being scheduled, these cases were transferred from Judge Aguilar to Judge William W. Schwarzer.

Over the strenuous objections of plaintiffs, Judge Schwarzer entered an order on June 11, 1985 holding that, while he felt he should adhere to Judge Aguilar's findings and order that the Jones Act would apply to the claims of *all* plaintiffs, foreign as well as American,[10A] he believed that Judge Aguilar did not really consider the forum-non-conveniens issue

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10A. In the June 11, 1985 opinion, Judge Schwarzer stated in connection with Judge Aguilar's prior choice-of-law determination:

"There is little doubt that American plaintiffs would be entitled to application of the Jones Act.... Four of the eleven actions would therefore be subject to the Jones Act. The Court is not prepared to say that, in these circumstances, the judge did not have discretion to apply the same law to all of the actions.

"The Court therefore finds no cogent reasons as exceptional circumstances to exist justifying reconsideration of the prior choice of law ruling." Ftnt 2, p. 20 of App. 50, E.R. in the Ct. of Appls.

as completely as he should have and, after considering such issue, Judge Schwarzer dismissed *all* of the cases on grounds of forum-non-conveniens despite the fact that the Jones Act applied to all of their claims. See Tab 51, E.R. Ct of Appls. This ruling, since it constituted the first case in the history of American law to hold that a case involving seamen to whom the Jones Act was held to apply would have to have their claims tried in foreign courts, generated a great outcry from the plaintiffs. Judge Schwarzer withdrew the opinion of June 1, 1985 and substituted the one which is the basis of this appeal. See A-32 to A-69 of Crowley's App. In that decision, refusing to apply the-law-of-the-case doctrine to his own ruling of June 11, 1985, as well as to Judge Aguilar's prior decisions,[10B] Judge Schwarzer

10B. The "law-of-the-case" doctrine was articulated as follows in *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9 Cir. 1963): "We think that *in the absence of changed circumstances*, and except there be some other 'most cogent reason', when a Judge makes or denies an

decided that he would, after all, re-examine Judge Aguilar's choice-of-law decision and hold that foreign law applied

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interlocutory order ... *it should not be reconsidered, even by the Judge who first made the order, much less by another judge.* Orders of United States Courts, deliberately made, after proper notice and hearing, *and subject to review by this Court*, are not to be lightly changed by any judge of the trial court." 316 F.2d at 810; emphasis ours. Other than changed circumstances, the only other cogent reason justifying reconsideration is the "patent and manifest erroneousness of the prior ruling", *In Re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 678 (D.C.Cir.1981). The circumstances promoting reconsideration must do much more than cast mere doubt on the correctness of the prior decision; they must create a "clear conviction of error" regarding the law of the case. *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2 Cir. 1981), cert den. 103 S.Ct. 65 (1983). And "delay" enters into the equation, *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162 (3 Cir. 1982).

We have not asserted as a reason for granting writ of certiorari the error of the Court of Appeals in not reversing Judge Schwarzer's refusal to apply the law-of-the-case doctrine with respect to Judge Aguilar's holding that the Jones Act applied to *all* of the plaintiffs and, with respect to his denial of the forum-non-conveniens motion because we feel that the law-of-the-case issue has little precedential value and the issues we *have* submitted for review are far more important, particularly to our body of maritime law.

to the foreign seamen; American law still applied to the claims of the American seamen or their survivors; but that the Court would still dismiss *all the cases* on grounds of forum-non-conveniens. Following Judge Schwarzer's disappointing decisions, the plaintiffs reactivated their parallel action which had been filed in the state court of Texas and which had been held in abeyance pending a *final* decision on the

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However, we believe the facts underlying our position on law-of-the-case - there having been no "changed circumstances", such as a change in the law or facts, between the date of Judge Aguilar's decision and Judge Schwarzer's subsequent decision; there being no "cogent reason" shown for disregarding Judge Aguilar's rulings (indeed, not only had Judge Aguilar reached his decisions, and twice reaffirmed them, after extensive discovery, briefing and arguments but the Ninth Circuit had three times denied interlocutory appeal with respect to Judge Aguilar's choice-of-law ruling and Judge Schwarzer had even applied the law-of-the-case doctrine with respect to it; thus, it obviously cannot be said that Judge Aguilar's rulings were so patently erroneous as to constitute a "cogent reason" for Judge Schwarzer's improvident reexamination of Judge Aguilar's rulings); there having been so much delay from the date suit was filed to the date Judge Schwarzer reversed Judge Aguilar; and

forum non conveniens issue by the San Francisco federal court. Despite the anti-injunction statute, 28 U.S.C. Sec. 2283, Judge Schwarzer enjoined the plaintiffs from proceeding with the state court action. Tab 67, E.R. Ct. of Appls.

Following Judge Schwarzer's decisions, all but the five plaintiffs represented by undersigned counsel settled and these five appealed.[11] The Court of Appeals held that Judge Aguilar's repeated holdings that the Jones Act applied to all five cases and Judge Schwarzer's initial holding to the same effect did not constitute

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plaintiffs were so prejudiced by such late-date change of direction - should still be taken into consideration, as a weight on the scale, with respect to the other issues we have formally presented in this petition. For example, Judge Aguilar's "global view" of applicable law should have some impact upon that issue because, consistent with the law-of-the-case doctrine, it was not a patently wrong decision. Indeed, as we argue, *infra*, it was a correct decision.

11. These included: the American Craig (his survivors); the British Zipfel (his survivor); the Australian Grunke; and the two Singapore plaintiffs, Chee and Albuquerque.

law-of-the-case; that the Jones Act applied to the Craig case; did not apply to the foreign seamen's cases; that the application of the Jones Act to the Craig case precluded dismissal of it on ground of forum non conveniens; that the dismissal of the foreign seamen's cases on ground of forum non conveniens was not an abuse of discretion; but that the district court's grant of a permanent injunction against the foreign seamen's state court action was an abuse of discretion. See A-1 to A-26 of Crowley App.[11A]

11A. The Crowley/Brinkerhoff defendants have filed a petition for certiorari, asserting that the Court of Appeals erred in reversing the district court's issuance of an injunction against the state court proceedings and in reversing the district court's dismissal of the Craig case (to whom the Jones Act applied) on ground of forum non conveniens, see Crowley Maritime, et al. v. Zipfel, No. 87-1122 on the docket of this Court. The Halliburton/McClelland/Oceaneering defendants have also filed a petition for certiorari, Halliburton et al. v. Zipfel, et al. No. 87-1391 on the docket of this Court. The only point urged by those defendants is the injunction issue.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. The question of whether, when the court is retaining jurisdiction as to one or more cases arising out of a mass disaster, it is an abuse of discretion to dismiss on grounds of forum non conveniens the other cases involved in the same disaster, is an important issue concerning which there is now a conflict among the courts of appeals.

The Court of Appeals correctly held that, because the Jones Act applied to the Craig case, the district court erred in dismissing that case on ground of forum non conveniens. See Opposition Brief of plaintiffs to Petition for Writ of Certiorari in No. 87-1122. Thus, it is clear that the district court is going to have to completely adjudicate the Craig case. The question thus arises as to whether it is an appropriate use of the doctrine of forum non conveniens to create two lawsuits, thousands of miles apart, with respect to one mass disaster, rather than disposing of all lawsuits arising out of such disaster in one court. The holding of the Court of Appeals that it would try the

American case but send the foreign seamen's cases to Singapore or Indonesia conflicts with the decisions of other courts of appeals, including but not limited to, *Liaw Su Teng v. Skaarup Shipping Corporation,* 743 F.2d 1140 (5 Cir. 1984); *Macedo v. Boeing Co.*, 693 F.2d 683 (7 Cir. 1980); *Timberlane Lumber Co. v. Bank of America N.T*, 549 F.2d 597 (9 Cir. 1976); and *Industrial Inv. Dev. Corp. v. Mitsui Co.*, 671 F.2d 876 (5 Cir. 1982).

In *Skaarup*, the M\V Feddy collided with the M\V Sounion off the coast of Algeria and the surviviors of the crews of the vessels sued Skaarup and Solvang, the owners of the Feddy, and Summitt, the owner of the Sounion, in the federal district court in Louisiana. Skaarup and Solvang moved to have the cases against them transferred to the Federal Court in New York where a limitation proceeding, instituted by them, was in progress. Summitt simply moved to dismiss the cases against it on ground of forum-non-conven-

iens. The district court transferred the cases against Solvang and Skaarup to New York and held the cases against Summitt should be dismissed on ground of forum-non-conveniens. The Fifth Circuit reversed, holding that the district court abused its discretion in granting the forum non conveniens motion of Summitt. In so doing, the court stated:

> But before thus putting asunder what the plaintiff has joined, the court must weigh carefully whether the inconvenience of splitting the suit outweighs the advantages to be gained from the partial transfer. It should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places . . . Manifestly, the plaintiffs will suffer some inconvenience if they are forced to litigate their claims in two courts, half the world apart from each other, with not only the consequent added expense and inconvenience but also the possible detriment of inconsistent results ... The public also has an interest in facilitating a speedy and less-expensive determination in one forum of all of the issues arising out of one episode. Thus the district court would have promoted convenience by transferring the entire case to New York, including the claims against Summitt.
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> * * * *
>
> ... the manipulations of the parties

> should not be permitted to obstruct what is patently in the interest of justice: that all of the claims, and all of the possible counter claims arising out of a single collision on the high seas be heard in a single forum.

743 F.2d at 1148-1149, 1150.

Industrial Inv. Development Corp. v. Mitsui & Co. says the same thing in another analogous situation. In that case, the plaintiffs asserted both an anti-trust claim *and* a common law claim against the defendants, involving land which was situated, and events which occurred, in Indonesia. The district court dismissed all the claims on forum non conveniens grounds. The court of appeals reversed and held, that since the anti-trust statutes, as does the Jones Act, contain special venue provisons, the district court had no discretion to dismiss the anti-trust claims on ground of forum non conveniens, citing *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948), and that it was an abuse of discretion to dismiss the common law claim, in view of the fact

that it arose out of the same basic facts underlying the anti-trust claim, which the forum court was going to have to try anyway.[12] 671 F.2d at 890.

The only decision we can find, other than this case, that could be remotely contrary to the Skaarup rationale is *Cuevas v. Reading & Bates Corp.*, 770 F.2d

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12. The Court in *Mitsui* stated: "Defendants argue that even if forum non conveniens does not apply to a Sherman Act claim, the district court's dismissal of plaintiffs' nonfederal claim on grounds of forum non conveniens was not a clear abuse of discretion under the standards set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12 (1947), and recently applied in *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 252, 266 (1981). *But once it is concluded that the Sherman Act claim should not have been dismissed, the question is not whether, as an original matter, it would be more convenient to hear the nonfederal claim in Indonesia, but whether it would be more convenient to force the parties to litigate two suits, one on the antitrust claim here, the other on the tort claim in Indonesia. The answer in this case is an obvious one; dismissal of the nonfederal claim would be a clear abuse of discretion. Such a course would simply force the litigants to undergo twice all of the inconveniences posited by defendants. To a great extent, the two claims involve the same events, evidence, and witnesses. It would be far more convenient to resolve both claims in one trial....*" 671 F.2d at 891; emphasis ours.

1371, 1383, 1384 (5 Cir. 1985). While the Fifth Circuit in *Cuevas* strained to distinguish it from *Skaarup* on choice-of-law grounds, 770 F.2d at 1383, 1384, *Cuevas* does seem, along with the implied holding of the Court of Appeals in this case, to contradict *Skaarup* and *Mitsui*, thus strongly suggesting the need for certiorari intervention.

In sum, we have here an "integrated case", the claims of injured seamen and survivors of deceased seamen, all killed or injured in the *same* accident and all involving the same witnesses, documents and experts on liability. It would seem to be in the interest of the court system, the public, the parties, the witnesses, convenience, and an overall economy of justice to require the trial of the Grunke, Chee, Albuquerque and Zipfel cases along with the Craig case in the district court below. Though we adamantly believe the Jones Act applies to Grunke, Chee, Alberquerque and Zipfel, as well as to Craig, see our discussion *infra*, even

if we are wrong about that there is no reason why the court below cannot apply foreign law, *Olympic Corporation v. Societe General*, 462 F.2d 376 (2 Cir. 1972)(hdnt 2),[12A] or submit to the jury alternative interrogatories under both foreign and U.S. law, *Foster v. Maldonado*, 433 F.2d 348 (3 Cir. 1970).

This question is of substantial importance to the administration of justice. In this day and age an of increasing mass tort accidents, often involving citizens from several different nations, this question is likely to present itself again and again and it just does not make sense to sanction the splitting up of these type cases among different nations. As stated in *Mitsui*, the underlying goal of the doctrine of forum non convenience is to *achieve convenience* and, to split asunder what was initially joined together,

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12A. Congress has manifested its intent that the federal district courts may apply foreign law in maritime cases. See 46 U.S.C. 764.

obviously has precisely the opposite effect.

B. The retention of jurisdiction over all the claims in this case is especially appropriate in view of the stipulations of the Petitioners and the other circumstances of this case.

There are a number of other important points dealing with the application of the forum non conveniens doctrine which should be reviewed by this Court.

(1) Assuming *arguendo* that the Jones Act and federal maritime law does not apply to the foreign seamen's claims, which forum non conveniens law applies, federal or state?

The Court of Appeals in this case assumed that, though it had affirmed the district court's holding that American maritime law did not apply to the foreign seamen's claims, it would apply federal law in deciding the forum non conveniens issue. See A-18, A-19, citing *Gulf Oil v. Gilbert,* 330 U.S. 501, 508 (1947). But, is that "assumption " correct?

This Court, in *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235, 248, 249 (ftnt. 13) (1981), pretermitted the issue of whether,

in a diversity case, federal or state law should apply to a forum non conveniens determination. There is a split of authority on that question,[13] but the issue here is slightly different. Jurisdiction was asserted under the maritime laws of the U.S. in these cases. But, because the Court of Appeals upheld the district court's decision that federal maritime law *did not* apply to the foreign seamen's claims, the application of federal law to the forum non conveniens issue could not have sprung from federal question jurisdiction. Regardless whether there is diversity here, cf. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir., 1985), it would seem that the proper ruling would be to apply the forum non

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13. Compare *In Re Air Crash Disaster Near New Orleans, LA*, 821 F.2d 1147, 1154-1159 (5 Cir. 1987) and *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1219 (11 Cir.), cert den. 106 S.Ct. 347 (1985) with *Weiss v. Routh*, 149 F.2d 193, 194-5 (2 Cir. 1945). And see Speck, *Forum Non Conveniens and Choice of Law in Admiralty; Time for An Overhaul*, 18 Jl Mar. Law & Com. 185 (1987).

convenience law of the state forum,[13A] especially where the state law is more favorable to giving effect to plaintiffs' choice of forum.[14]

In any event, the issue is an important one in this case because the forum non conveniens law of California virtually mandates the retention of jurisdiction. See ***Holmes v. Syntex Laboratories Inc.***, 156 Cal.App.3d 380, 202 Cal.Rptr. 773 (Cal.App. [1st Dist] 1984).[14A]

13A. This Court, in ***Gulf Oil v. Gilbert***, 330 U.S. 501 (1947), thoroughly discusses the deference given state forum non conveniens law, even where the state is adjudicating federal rights. 330 U.S. at 504, 505.

14. This is especially true in this case because of the clause in the contract controlling all disputes pertaining to the Brinkerhoff I, which ordained the application of California "state law", not federal law. See further discussion of such choice of law clause in reference to the choice of law question, *infra*.

14A. ***Holmes*** expostulates a number of reasons why this is true, including: (1) the rule of "substantial deference to plaintiffs' choice of forum" has as much weight in a foreign plaintiff's case as in an American plaintiff's case under California law, whereas under ***Piper***, a foreign plaintiff's choice of forum has much less weight, 202 Cal.Rptr. at 778 and

A decisior by this Court on this issue will have broad precedential impact because most of the other state courts that have forum non convenience criteria different from the *Piper* criteria have utilized criteria which is much more liberal toward retention of jurisdiction. See discussion of Louisiana forum non convenience law in *In Re Air Crash Disaster Near New Orleans,* 821 F.2d at 1154, 1155 and discussion of Texas forum non conveniens law in *Chick Kam Choo v. Exxon Corp.,* 817 F.2d 307, 314-316 (5 Cir.), cert granted, 108 S.Ct. 343 (11/16/88). We believe the heretofore automatic

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(2) California applies the rule adopted by the court of appeals in *Piper*, which reversed the district court's forum non conveniens dismissal because the law of the foreign forum was less favorable to the plaintiffs than the law of the forum and the Supreme Court, in *Piper*, reversed the court of appeals on that very ground, adopting the position that a change in law is of no consequence. 202 Cal.Rptr. at 778, 779. While it is our position that there are, in fact, *no* adequate remedies in Indonesia or Singapore, at the very least the remedies, if any, are substantially less favorable to plaintiffs than those available in the United States. See discussion, *infra*.

assumption that the *Piper* federal forum non conveniens criteria must be used in a maritime case, even though the district court has held that American maritime law[14B] does *not* apply, is a presumptuous assumption and certiorari should be granted so that this Court can disabuse the federal courts of such notion. This would seem to be consistent with the rationale of *Erie R.R. Co. v. Tompkins*, 304 U. S. 64 (1938) and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487

14B. We mention "other federal law" because, for example, though the Jones Act would not apply if the plaintiff was not a seaman, the general maritime law might still apply (e.g., a passenger on an American vessel). In such a case, the mere application of the general maritime law, and not the Jones Act, would not compel retention of jurisdiction since the general maritime law, being a creature of the common law, has no *special* venue provisions - indeed, no venue provisions - as does the Jones Act. See discussion in our Response to Crowley's Petition for Writ of Certiorari. There, it is established that there is no such thing as forum non conveniens if the Jones Act applies. But, if under federal maritime choice-of-law principles, see *Romero* (holding that they apply to general maritime law as well as Jones Act claims), the general maritime law of the U.S. is held to apply, a forum non conveniens dismissal under *Gilbert* and *Piper* might still be appropriate.

(1941).[15]

(2) An important aspect of this case, deserving certiorari review, is the effect of the stipulations offered by the Petitioners in the district court, which virtually eliminated all potential "inconvenience" which would have been involved in the trial of the cases in the U.S.

This Court in *Piper v. Reyno* held four-square that stipulations by the parties in forum non conveniens proceedings can not only be influential, but can be compelling, of the court's decision on the forum non conveniens issue. 454 U.S. at

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15. Thus, it has been stated that *Erie* is "[a] policy so important to our federalism [that it] must be kept free from entanglements with analytical or terminological niceties". *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Indeed, as one court noted, the federal courts have, in certain instances, applied state procedural law. *Conway v. Chemical Leamon Lines, Inc.*, 540 F.2d 837, 839 (5 Cir. 1976). We should mention that the court of appeals in *Chick Kam Choo v. Exxon*, 817 F.2d at 316-324, held that the doctrine of preemption requires a state court to apply federal forum non conveniens principles in a maritime case and this Court has granted certiorari in that case with arguments to take place before this Court on March 30, 1988. Though the issue here is whether a federal, not state, court should apply state forum non conveniens law, we advise the Court of the related nature of the issues in this case to those in *Chick Kam Choo*.

434 (See particularly ftnt 25, *infra*).[15A] In this case, the Petitioners tendered in the district court the stipulations listed in the Statement of the Case above. These stipulations meant that all the material witnesses, lay or expert, would be available in the U.S., except perhaps the initial treating doctors and the Indonesian investigators of the crash.[16] These

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15A. The Court, in *Gulf Oil v. Gilbert*, seemed to be less hospitable to stipulations by the plaintiffs, 330 U.S. at 511, 512, but, in view of the controlling effect the Court gave stipulations by the defendants in *Piper*, we cannot believe that the Court would now treat plaintiffs stipulations any differently.

16. In analyzing the private interests of the parties, the courts focus upon "the location of the witnesses and evidence". *Gulf Oil v. Gilbert*, 330 U.S. at 508. In that regard, the Respondents cannot sit idly by and offer no evidence of whom the foreign witnesses are and what the general substance of their testimony will be. This Court has stated that, while the defendants are not required to provide information concerning witnesses and evidence "in specific detail, they still must provide enough information to enable the district court to balance the parties' interests". *Piper v. Reyno*, 454 U.S. at 258-259. In this case, the Defendants did not satisfy the burden placed upon them by this Court. See also *Gates Learjet Corp v Jensen*, 743 F.2d 1325 (9 Cir. 1984) and

witnesses pale into insignificance, insofar as weight against the chosen forum is concerned, because of the stipulations by plaintiffs to permit use of the investigators' report, to bring plaintiffs to San Francisco for examination by doctors of defendants' choice and to pay the expenses of defendants' counsel to go to any foreign country for depositions of relevant witnesses located there.[17]

Grubbs v. Consolidated Freightways, Inc., 189 F.Supp. 404 (DC Mont 1960). In *Gates Learjet*, the court stated: "Furthermore, the district court improperly focused on the number of witnesses in each location. Instead, the court should have examined the materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience to the forum." 743 F2d at 1335-1336. See also *LeSeguridad v. Transytur Line*, 707 F.2d 1304 (11 Cir. 1983).

17. Other courts have given dispositive weight to precisely the same stipulations *we have tendered in this case. Famcus v. Textron*, Cause No. 4-79-331-K (N.D.Tex. 1984) and *Costa v. Textron*, Cause No. CA-4-81-233 E (N.D.Tex. 1984). Also see *Irish National Insurance Ltd. v. Air Ligus Teoranta*, *supra*, 739 F2d 90, 92 (2 Cir. 1984), wherein the court stated: "... we do not share the district court's concern about the possibility that appellees counsel might have to fly to Ireland to take testimony, especially since appellant

As to the plaintiffs' stipulations, if defendants are going to be allowed to alter forum non conveniens determinations through stipulations, as per *Piper*, so should the plaintiffs. If the defendants are going to be allowed to stipulate their way into a forum non conveniens dismissal the plaintiffs ought to be allowed to stipulate their way into a forum non conveniens denial.

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has indicated its willingness to pay the expense of such attendance." The *Costa* case is a model case of what should be done in these cases where the defendants are sued in their home forum - $25,000 was placed in the registry of the Ft. Worth federal district court by plaintiffs and was used by defendants' counsel and a court reporter to go to Brazil for depositions desired there by defendants; on the basis of plaintiffs stipulations and deposit, the court did not grant, but deferred, the defendants' forum non conveniens motion; the case went to trial and was settled during trial for values less than normal American values but more than Brazilian values. This process saved many hours of attorney and court time that would have been expended on appeals had the district court dismissed on ground of forum non conveniens and, most important, brought about the "substantial justice" that our court system makes its preeminent purpose.

A realistic analysis of this case - in the light of the above stipulations; the fact that the non-US, non-party witnesses are spread among several nations, rather than being concentrated in just one or two; and the fact that suit has been brought in the forum where the primary defendant has its home office[18] is that the "convenience of the parties and witnesses" weighs overwhelmingly in favor of trial of *all* the remaining cases involving the aircrash in question in the U.S., as compared to any *one* other foreign nation. And we need not remind this Honorable Court of its venerable teaching in *Gulf Oil v. Gilbert* that "unless the balance is *strongly* in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed." 350 U.S. at 508; emphasis ours.

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18. — It is rarely inconvenient for an international corporation, which has business interests all over the world, to defend itself in its own home forum. *Tivoli Realty Inc. v. Interstate Circuit, Inc.*, 167 F.2d 155 (5 Cir. 1948), cert den and *Burt v. Isthmus Development Co.*, 218 F.2d 253 (5 Cir. 1955), cert den. 349 U.S. 922.

Lastly, respondents simply did not satisfy their burden of showing that Singapore and Indonesia were truly viable "alternative" fora. See *Piper*, 454 U.S. at 254, 255.[19]

In sum, the urgent need for the Court to grant certiorari and undertake a thorough review of the forum non conveniens doctrine particularly in maritime

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19. There are three reasons why this is true: (1) there was a disputed issue as to whether a cause of action in Singapore or Indonesia against defendants in an aircrash case is "extinguished" two years from the date of the crash and, therefore, the application of the statute of limitations cannot be waived; see Warsaw Convention, 49 Stat. 3000, TS 876, 137 LNTS 11 and *In Re Aircrash Bombay, India*, supra; (2) there was no showing by defendants that either Singapore or Indonesia would recognize the non-delegability duty doctrine (which American courts would apply in this maritime case), see Footnote 7, *supra*; and (3) we hope this Court will recognize that, with regard to a case such as this one - involving parties and witnesses all over the world - the U.S. courts are in a class all their own; our courts are the only ones armed with the procedural and discovery weapons indispensable to a gathering of the evidence necessary to a proper adjudication in these type cases. See *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F.2d 611, 614-615 (3 Cir. 1966).

cases, becomes apparent when we recall what this Court anticipated in *Gulf Oil v. Gilbert*:

> The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

330 U.S. at 508. The pendulum has now swung far too far the other way - there is almost a compulsion, let alone a "tendency", on the part of federal district courts to dismiss foreign plaintiffs' cases on ground of forum non conveniens. This case is an excellent example of how far the pendulum has swung.

In view of this heavily chauvinistic trend, so contrary to the one contemplated by this Court in *Gulf Oil v. Gilbert*, it would seem important for the Court to review where we are now in forum non conveniens law and decide whether or not the district courts and courts of appeals have swept too far.

C. Certiorari intervention has long been needed on the important question of

whether the SLSIS Treaty mandates that American shipowners make available to all foreign crewmembers of their vessels the same rights, including the Jones Act and American maritime law, that are available to American crewmembers of such vessels.

The first and only district court to directly address the above issue, ***Munusamy v. McClelland Engineers, Inc.***, 579 F.Supp. 149 (E.D.Tex. 1984), certif. of interloc. app. directed 742 F.2d 837 (5 Cir. 1984), rev and remanded 784 F.2d 1313 (5 Cir. 1986), had this to say:

> Third, the maritime law of the U.S. prohibits such discriminatory treatment of foreign seamen. Shipowners' Liability (Sick and Injured Seamen) Convention, October 24, 1936, 54 Stat. 1693 (the Treaty). ...
>
> Moreover, the Treaty expressly requires "equality of treatment to all seamen...irrespective of nationality, domicile or race." 54 Stat. 1700. ***The court believes this to be an important requirement, although it appears not to have been raised heretofore.*** It is the opinion of the court that the clear language of the Treaty forbids choice of law according to the nationality or domicile of the plaintiff.
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> Supreme Court holdings are not contrary. In *Lauritzen*, for example, the Court did not predicate its choice of law on the seaman's nationality or domicile. Rather, it gave "cardinal importance to the law of the flag,"

> directing that "it must prevail unless some heavy counterweight appears." *Id.*, 345 U.S. at 586, 73 S.Ct. at 930. In *Piper* no seamen were involved, so the Court's discriminatory treatment of foreign plaintiffs did not offend or involve the Treaty.
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> The Court earlier emphasized the importance of "equality of treatment" and U.S. leadership in maritime tort law. The aim of the Convention, the Court explained, was "to equalize operating costs by raising the standards of member nations to the American level." *Warren v. U.S.*, 340 U.S. 523, 527, 71 S.Ct. 432, 435, 95 L.Ed. 503 (1951). For that reason alone, the court should probably decline to choose foreign law when it imposes a lower standard of care or relief than domestic law.

579 F.Supp. at 156, 157. The Fifth Circuit Court of Appeals, in two reviews, refused "to assay the merits" of the above holding of the district court, except to say the district court's decision "represents a candidly novel and clear departure from our holdings and those of the Supreme Court." 742 F.2d at 838, 839. The Ninth Circuit Court of Appeals also declined to consider the issue in *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1483 (9 Cir. 1986). In this case, the SLSIS Treaty was specifically

pled and argued throughout these proceedings and the district court squarely held against the plaintiffs on that issue. A-47, A-48, Crowley app. Though the issue was raised, and raised again on petition for rehearing, the Court of Appeals simply did not address the issue. See the Court of Appeals discussion of the choice of law issue, A-13 to A-16 of Crowley app.

In any event, we submit that the interpretation of the SLSIS Treaty by the Beaumont district court in *Munusamy* is correct. Indeed, it is consistent, not inconsistent, with Supreme Court holdings. As far back as 1890, this Court in *Ross v. McIntire*, 140 U.S. 581 (1890), held that a subject of Great Britain, serving as a member of the crew of a vessel flying the American flag, was deemed to be American for purposes of applicable law.[19]

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19. This Court stated: "This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country ...." 140 U.S. at 591.

Moreover, the principle that treaties can confer upon nominal foreigners' the same access to our courts and our laws that American citizens have, has been recognized by a number of courts. See *Irish National Insurance Co. Ltd. v. Aer Lingus Teoranto*, 739 F.2d at 91, 92 (holding such rule applicable to the Warsaw Convention); *Farmanfarmian v. Gulf Oil Co.*, 588 F.2d 880 (2 Cir. 1978); and *Grimandi v. Beech Aircraft Corp.*, 512 F.Supp. 764, 777, 778 (D.C. D.Kan. 1981).

The "global solution" approach to choice of law,[20] see discussion in *In Re Paris Air Crash of March 3, 1974*, 399 F.Supp. 732 (C.D. Cal. 1975), springs from the same concept expressed in the SLSIS and other treaties establishing equal access to the courts and to rights. This was the approach taken by Judge Aguilar, and properly so, see App. A, B and E of Pltfs App., and this approach is clearly

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20. The "global solution" approach means that one law would apply to all cases arising out of one accident.

consistent with the rationale expressed by this Court in *Lauritzen*, in discussing the seaman's contract:

> The practical effect of making the lex loci contractus govern all tort claims during the service would be ... *to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.*

345 U.S. at 588; emphasis ours.

The concept of applying foreign law to foreign seamen on American vessels, even though American law is being applied to American seamen on the same vessel, had its origins in *In Re Ocean Ranger Sinking Off Newfoundland*, 589 F.Supp. 302 (E.D.La. 1984), which was heavily relied upon by Judge Schwarzer in this case, A-45, A-46. But in *In Re Ocean Ranger*, the effect of the SLSIS Treaty had not been raised in the district court.[21]

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21. Even before *In Re Ocean Ranger*, the drilling industry had persuaded Congress to adopt such concept, 46 U.S.C. 688b, but, again, Congress did not even mention the obligation of this nation under the SLSIS Treaty (see HR Report 97-863), and the enactment, expressly discriminating,

In any event, the question of the effect of the SLSIS Treaty is of substantial importance to our maritime law and to our treaty obligations and such question, raised and decided in *Munusamy* and rejected by Judge Schwarzer in this case, should be resolved by this Court.

D. The effect of the contract controlling the operations of the Brinkerhoff I, and its provision that American (Californian) law should apply, is an important question which should be resolved by this Court.

The Court in *Lauritzen*, in outlining the relevant principles which should be considered in a maritime choice-of-law determination, listed the relevant contracts as one of them, and stated:

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as it does, against those of a different nationality even though they are crewmen on an American-flagged vessel (and thus, as this Court stated in *Ross v. McEntire*, must be considered "American") is of questionable constitutionality. But, since this accident occurred before the effective date of 688b, such amendment is not applicable because 688b contains a savings clause; therefore, the question of its constitutionality is not a ripe issue in this case.

> Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flagstate as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. *The Belgenland*, 114 U.S. 355, 367, 29 L ed 152, 166, 5 S Ct 860; *The Hanna Nielson* (DCNY) 273 F 171. We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.

345 U.S. at 588, 589. And, in *Bremen v. Zapeta*, 407 U.S. 1 (1972), this Court gave powerful effect to choice-of-law and forum selection clauses in maritime agreements.[22]

What we contended in the district court and court of appeals, contentions which were virtually ignored, was that the provisions of the contract between BMDC and ARII evidenced an intent that the

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22. See also *Philippine Packing Corp. v. Maritime Co. of the Philippines*, 519 F.2d 811 (9 Cir. 1975).

crewmen could be the beneficiary of the choice-of-law clause contained therein (the contract expressly covered the injuries to crewmen, indemnity and other related matters). *In Coastal Steel v. Tilghman Wheelbrator. Ltd.*, 709 F.2d 180 (3 Cir. 1983), the court specifically enforced a choice-of-law, forum selection clause in favor of a third-party beneficiary.[23] And in *Gulf Trading & Transportation Co. v. M/V Tento*, 694 F.2d 1191 (9 Cir. 1981), the court held that, since the vessel charter provided for the application of "United States law", lien claimants, even though not parties to the charter, could enforce their claims against a party to the charter, *Norexia*, under U. S. law pursuant to the choice of law clause in the charter, because they

23. The court stated: "Thus it was perfectly forseeable that Coastal would be a third-party beneficiary of an English contract, and that such a contract would provide for litigation in an English court. Reliance on Coastal's third-party beneficiary status as a reason for disregarding such a clause was an error of law." 709 F.2d at 203.

were third-party beneficiaries of such clause and such clause established *Norexim's* "original expectations" that U.S. law would apply to all matters arising out of the use of the vessel so chartered. 694 F.2d at 1196.

The parties to the charter agreement in this case (the Day-Work contract), which controlled the use and operation of the Brinkerhoff I, expressly stipulated that all disputes arising out of its use would be determined in accordance with the law of California, U.S.A. Such charter also placed upon BMDC the obligation to provide safe transportation for crew members to and from the vessel and contained numerous provisions relating to the injury or death of crewmembers. These clauses manifested the "original expectations" of BMDC and ARII that the crewmen should have the benefit of the contract, including the choice-of-law clause.[23A]

23A. Indeed, Schedule E of the contract demonstrated this in forceful fashion by providing that BMDC would carry insurance to protect it from "liability under the Jones Act and the General Maritime Act (sic) ...". par. E-2 of App. G.

In view of the continuing and extensive use of charters and contracts to control maritime transactions, including offshore drilling operations, it is important for the Court to undertake certiorari intervention and make it clear that parties to these agreements will not be allowed to run to the American courts to resolve their own differences pursuant to choice-of-law clauses in such charters and contracts but yet disclaim such clauses with regard to the rights of crewmembers whose very lives and safety are determined by the implementation of the charter.

E. There are other reasons why the Court should grant certiorari with respect to the choice-of-law question.

(1) In view of the fact the crash occurred on land, should not the Court have utilized an overgloss of California state choice-of-law principles?

Both Judge Schwarzer and the Court of Appeals applied only maritime choice of law principles. See A-40 to A-48 and A-13 to A-16. But this crash occurred on land.

While we certainly agree that this was a maritime accident because these crewmembers were on their way to their vessel when the crash occurred, we do think the district court should, as mandated by *Klaxon* in diversity cases, have at least considered the choice-of-law principles enunciated in such decisions, discussing California choice-of-law principles, as *Forsythe v. Cessna Aircraft Co.*, 520 F.2d 608 (9 Cir. 1975); *In Re Paris Aircrash, supra*; and *Bernhardt v. Harold's Club*, 16 Cal.3d 313, 128 CalReptr 215, 546 P.2d 719, cert. den. 429 U.S. 859 (1976).[24] And, as between the federal maritime and state choice-of-law principles, utilize those more favorable to the application of American law, be it the Jones Act, general maritime or California state law.[24a]

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24. And see Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 Calif. L. Rev. 577.

24a. Such an interfacing between maritime and California law was discussed in *Allen v. Matson Navigation Co.*, 255 F.2d 273 (9 Cir. 1958).

California state choice of law concepts, particularly those applicable in aircrash cases, when meshed with maritime choice-of-law principles, completely infuse into the equation in this case the fortuity element discussed in *Lauritzen*, 345 U.S. at 584-589 [and the absence of which was made the basis of the "rig cases" doctrine enunciated in *Phillips v. Amoco Trinidad*, 632 F.2d 82 (9 Cir. 1982), cert den. 451 U.S. 920 (1981), see discussion of same, *infra*.], because, as observed in *Brickner v. Gooden*, 525 P.2d 632, 313 CCH Av. Cases 17, 197 (Okla. 1974), "it would seem rather undesirable that the rights and obligations of the parties should be subject to change as the aircraft crosses the boundary lines of each jurisdiction." Since the place of the aircrash in this case was fortuitous,[25] there is all the

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25. Indeed, the crash could have easily occurred on the high seas. The "high seas", in maritime personal injury cases, means more than 12 miles out to sea; even where an accident occurs in a nation's "economic zone", if it is more than 12

more reason, as stated in *Lauritzen*, to look to the "more constant law of the flag" of the vessel in deciding upon the applicable law. 343 U.S. at 584-586.

Other state aircrash choice-of-law principles which would point toward the application of American law are the better law rule,[26] analysis of true conflicts versus false conflicts with respect to each issue,[27] and greater emphasis upon the domicile or home office of the defendant.

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miles out to sea it is still an accident on the "high seas" for choice-of-law purposes. *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 295 (5 Cir. 1984).

26. See *In Re Air Crash Disaster Near New Orleans*, 816 F.2d at 1169 and see thorough discussion of how such rule was applied in the earlier panel decision in that case, 789 F.2d 1092; *Bonn v. Puerto Rico International Airlines, Inc.*, 518 F.2d 89 (1 Cir. 1975); and 68 Calif. L. Rev. at 604.

27. See Bernhard, *In Re Paris Aircrash*; and *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 583 P.2d 721, 148 Cal.Rptr. 867 (1978). Also see discussion of the principle of depecage in *In Re Air Crash Near New Orleans*, 821 F.2d at 1170.

Related to the foregoing issue, but not quite the same, is whether the court should, if it decides that American maritime law does not apply, then determine whether state law independently applies. This seems to be suggested in *Rosero v. International Terminal Operating Co.*, 358 U.S. 354, 384, 385, 389 (1959).

In sum, certiorari intervention on these questions is seriously needed because they will affect the numerous situations in which the event in question is not purely maritime in nature or the court has decided not to apply American maritime law.

(2) The rig-cases doctrine is contrary to Supreme Court law and, even if appropriate, has been misapplied in this case.

In *Phillips v. Amoco Trinidad*, the Ninth Circuit decided that the Jones Act did not apply, even though the vessel on which the decedents served flew the American flag and was owned by an American company. The court of appeals held that -

because the vessel had remained in a fixed location in the territorial waters of Trinidad for a long period of time, the seamen were Trinidad nationals who contracted to work only in the territorial waters of Trinidad and agreed to look only to Trinidad law in case of injury or death - Trinidad law would apply, primarily on the ground that, under the circumstances, the nationality of the workers, the place of contract and place of accident (which all coincided in Trinidad) were not fortuitous, as they were in *Lauritzen*, and thus were entitled to greater weight in the rig-case context than in the blue-water vessel context. 632 F.2d at 86-88.[28]

The district court and the Court of Appeals in this case followed the rig-cases doctrine in deciding that the Jones Act did not apply to the foreign seamen serving on the Brinkerhoff I. A-40 to A-48 and A-13 to A-15, Crowley app. We have two

28. The Fifth Circuit adopted the *Phillips* rationale in *Chiazor v. Transworld Drilling*, 648 F.2d 1015 (5 Cir. 1981), cert den., 102 S.Ct. 1714.

serious problems with the rig-cases doctrine. The first is that we have read and re-read *Lauritzen* and *Rhoditis* and can find nothing in those cases which would permit such a radical convolution of the maritime choice-of-law criteria. The courts below, along with Congress, in their zeal to expunge foreign seamen from the U.S. courts, have overlooked the irrefutable facts that: foreign crew members of offshore rigs are "seamen" within the meaning of the Jones Act; the offshore rigs on which they serve *are* "vessels" within the meaning of the Jones Act; and the American owners of those vessels did make the conscious choice - with full knowledge of the teachings of *Lauritzen* about the controlling effect of the flag of the vessel[29] - to

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29. The Court in *Lauritzen* noted: "... Each state under international law may determine for itself the conditions on which it will grant its nationality o a merchant ship, thereby accepting responsibility for it and acquiring authority over it. ... Nationality is envidenced to the world by the ship's papers and its flag. ...". 345 U.S. at 584-586.

register their vessels in the U. S., just as BMDC in this case made the conscious choice to register the Brinkerhoff I in the U.S., fly the American flag, make its home-port in San Francisco, and place it under the control of the U.S. Coast Guard.

While, as we noted above, the presence of fortuity does play a role in lessening the weight to be given the nationality of the seamen and the place of the accident, *Lauritzen*, 345 U.S. at 583, 584, 586, 587, *Lauritzen* does *not* accept, but indeed rejects, the notion that the absence of fortuity would in any way lessen the importance and substantiality of the contact with the U.S., in a maritime choice-of-law context, *of an American flagged and/or owned vessel*. This Court made it clear that the controlling effect of the law of the flag arises from the view that a vessel flying an American flag "is deemed to be a part of the territory of [the U.S.] sovereignty ... and not to lose that character when [as an offshore

drilling vessel sometimes is] in navigable waters within the territorial limits of another sovereignty". 345 U.S. at 585.

And then there is *Rhoditis*, which made it clear that if the vessel flies the American flag *or* is owned by an American entity *or* the owner has its base of operations in the U.S., such single or combined contacts constitute such "substantiability" of contacts with the U.S. [citing *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 440 (2 Cir. 1959), cert den.], as to mandate the application of U.S. law. This is true because of the "liberal purposes" of the Jones Act and not because of the presence or absence of fortuity and without regard to what type of vessel is involved. 398 U.S. at 310.[29a]

29a. As noted by Carlson, *The Jones Act and Choice of Law*, 15 International Lawyer 49, 60-63, where the vessel is flying the American flag *or* is owned by an American entity, "the application of U.S. law is beyond doubt." Carlson describes the "substantiality" test, adopted by the Court in *Rhoditis*, as follows: "... a judge using the *Bartholomew* test need only consider each fact or group of facts constituting an American contact with the

Thus, the rig cases doctrine announced in *Phillips* and applied in this case, to the extent that it rejects American law even though the vessel carries the U.S. flag or is owned by an American entity or the owner has its base of operations in the U.S., is in clear contradiction to the law announced in this Court and the Court should, we respectfully suggest, grant certiorari and disavow *Phillips'* unwarranted encroachment upon the Jones Act.[30]

The second problem we have with the rig cases doctrine is that even if this Court

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the transaction to determine whether that contact is substantial; if no single contact is substantial, the judge must then decide whether the aggregate of insubstantial contacts adds up to the necessary substantiality. No balancing at all occurs in the *Bartholomew* test". See also *Fisher v. Agios*, 628 F.2d 309 (5 Cir. 1980). reh den, 636 F.2d 1107, cert den. 102 S.Ct. 92.

30. The Respondents will undoubtedly argue that the adoption of 46 USC 688b makes the determination of this issue of little precedential value. But they are wrong on several counts. As we have pointed out above, 688b may very well be unconstitutional. And it contains a multitude of exceptions or gaps which would make the resolution of the viability of the rig-cases

were to decide that some sort of rig cases rule is in order, we submit that it should

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doctrine of broad precedential value. For example, would the 688b amendment to the Jones Act bar such general maritime law claims as those which have been asserted by Chee, Grunke and Albuquerque? Moreover, 688(b) is in direct conflict with the SLSIS Treaty. There are serious questions as to whether 688(b)(2)(A) and (B) would apply if the remedy to be provided by the relevant foreign nations under (A) and (B) becomes possible *only* through waiver of one or more of the parties of the absence of in personam jurisdiction in the foreign court. In addition, the rig cases doctrine has already been judicially extended to situations expressly not covered by 688b, such as bulk carriers of oil. See *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478 (9 Cir. 1985)(holding that the rig cases rationale of *Phillips* was applicable to bulk carrier vessels operating off Saudi Arabia). Therefore, 688(b) does not nullify the precedential value of this issue with respect to those cases and, based upon *Villar*, the rig cases doctrine could extend to any American blue-water vessel even temporarily sailing coastwise in any foreign country. Lastly, and most important, 688(b) refers *only* to accidents occurring "in the territorial waters or waters overlaying the continental shelf of a nation other than the United States", 688(b)(1)(B). Since this accident happened on land, and not in the territorial waters of any nation, 688(b) would not have applied even if this accident had happened after 688(b)'s effective date. The Court of Appeals below has thus extended the rig cases doctrine to another area clearly not covered by 688(b). And thus the importance of this Court's certiorari intervention remains despite 688(b).

grant certiorari and establish proper and reasonable limitations and parameters upon its application. We have already noted how the doctrine has now crept into the blue water vessel area of maritime law, see *Villar* and note 30, *supra*, and, what seems rather obvious now, is that the courts of appeals may be on a course of totally emasculating the principles this Court established in *Lauritzen* and *Rhoditis*.

This case, for example, is a far cry from the progenitor of the rig-cases doctrine, *Phillips v. Amoco*. Compare the Statement of Case above to the essential facts in *Phillips*, 632 F.2d at 87. We submit that the Court of Appeals' application of the rig cases doctrine to the facts of this case is so far beyond the rationale of *Phillips* and so clearly contrary to the precepts of *Lauritzen* and *Rhoditis* as to be completely untenable and it is extremely important to the uniformity of the body of maritime law for this Court to intervene and say so.

It has been 18 years since this Court has dealt with maritime choice-of-law. During that 18 year period there has been a veritable explosion of use of vessels to explore for off-shore oil. For some reason, the lower courts have strained mightily to insulate the international off-shore drilling industry, the great majority of which is based in Houston, from American maritime law by adopting the rig-cases doctrine. This Court has never reviewed the efficacy of that doctrine (having denied writs of certiorari in both *Phillips* and *Chiazor*). But the rig cases doctrine has, since *Phillips* and *Chiazor*, become a doctrine out of control. It has become a doctrine which is now being applied in blue-water vessel situations. It has become a doctrine being used to undermine the venerable precepts established by this Court in *Lauritzen*, *Romero* and *Rhoditis*. The need for Certiorari intervention and action by this court has never, we submit, been greater

in the maritime field of law.

(3) This Court should decide whether, when the plaintiffs have requested trial by jury in a maritime case and disputed fact issues exist with respect to choice-of-law criteria, which disputed issues mesh with fact issues relevant to the merits of the case, it is appropriate to resolve the choice-of-law issue prior to trial on the merits.

Space does not permit a thorough discussion of this issue. However, this Court, in *Romero*, characterized the choice-of-law determination as one "to determine whether a claim was stated upon which relief can be granted" and, since evidence was received in *Romero* "outside the pleadings", *as in this case*, "Rule 12(c) allows such evidence to be admitted, requiring the court *then to treat the motion as one for summary judgment under Rule 56.*" 358 U.S. at 357, n.4. This same approach was taken by the Third Circuit in *Chirinos de Marin v. Exxon*, 613 F.2d 1240, 1244 (3 Cir. 1980) and by the district court in *Munusamy*, 579 F.Supp. at 157. See also the dissent in *Antypas v. Cia Maritima San Basilio, S.A.*, 451 F.2d 307,

311 (2 Cir. 1976).

But the Fifth Circuit in *Borralho v. Keydril Co.*, 696 F.2d 379, 385-388 (5 Cir. 1983) and the Ninth Circuit in *Villar*, 782 F.2d at 1479, 1480, are directly to the contrary. Because of this direct conflict among the circuit courts and with the Supreme Court, this issue is ripe for certiorari intervention. And this issue is very important to our maritime law, to the right of trial by jury and to the procedural guidelines for choice-of-law determinations.

In this case, the district court, apparently taking its cue from *Villar*, decided the choice-of-law issue even though there were a number of issues - if not undisputed in plaintiffs' favor, at the least disputed - which were relevant to the choice-of-law determination.[30A]

30A. These included whether BMDC was the de facto maritime employer of Zipfel, Chee and Albuquerque; whether Grunke, Zipfel, Chee and Albuquerque were third-party beneficiaries of the choice-of-law provisions in the vessel charter (Day-Work contract) between BMDC and ARII; what the

Contrary to the reasoning of the Court in *Villar*, there is no problem procedurally in deferring the choice-of-law determination to the trial on the merits because the court can simply submit alternative interrogatories to the jury and rule accordingly. *Foster v. Maldonado*, 433 F.2d 348 (3 Cir. 1970) and *Munusamy*, 579 F.Supp. at 157.[31] Most important, in this way, as provided for in the Seventh Amendment, the Jones Act and the Federal Rules of Procedure, the plaintiffs sacred right to trial by jury on *all* disputed material issues will

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"original expectations" about the applicable law were with respect to the parties; whether relevant managerial policy decisions were negligently made in San Francisco; whether the base of operations of the vessel was jointly in San Francisco and Singapore or solely in Singapore; and what the law of Singapore and Indonesia was with respect to "extinguishment" of causes of actions in aircrash cases.

31. In *Munusamy* the Court stated: "Naturally, the court must defer ruling on the merits (of the choice of law question) until all the evidence is presented. If at that time the court chooses foreign law, it will so instruct the juries or rule accordingly." 579 F.Supp. at 157.

have remained inviolate.

CONCLUSION AND PRAYER

There are a number of issues in this case which have vital importance to the maritime law of the United States. Some of the Respondents in this case have already sought certiorari. See No. 87-1122, ***Crowley Maritime, et al. v. Zipfel, et al.*** and ***Halliburton, et al. v. Zipfel, et al.***, No. 87-1391. The issues we have raised include a broad spectrum of issues which have had need of review by this Court for quite some time. This is one of those maritime cases where, as observed in *Romero*, a "full exposition" of certain areas of our maritime law is called for. 358 U.S. at 360.

WHEREFORE, PREMISES CONSIDERED, the Petitioners pray the Court to grant certiorari on the issues raised in this Petition.

Respectfully submitted,

Benton Musslewhite
609 Fannin, Suite 517

Houston, Texas 77002
(713) 222-2288

John O'Quinn
3200 Texas Commerce Tower
Houston, Texas 77002

Lyle C. Cavin, Jr.
122 World Trade Center
San Francisco, Calif. 94111

Attorneys for Petitioners